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November 18, 2008

Jeff S. Jordan, Esq.  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

Re: MUR 6082

Dear Mr. Jordan:

On behalf of Majority Action, this letter is submitted in response to the Complaint filed by the National Republican Congressional Committee, dated September 26, 2008. The Complaint alleges that Majority Action is a political committee under the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* (2006) (the "FECA" or "Act"). Complainant fails to allege a single instance where Majority Action engaged in express advocacy, made or received contributions, or coordinated with Federal candidates and, thus, presents no violation of FECA by Respondent. The Commission should dismiss the Complaint immediately and take no further action.

## I. FACTUAL DISCUSSION

Majority Action is a nonprofit organization, operating under the laws of the Commonwealth of Virginia. It is taxed as a political organization under section 527 of the Internal Revenue Code ("IRC"); its stated purpose, as recorded on its Internal Revenue Service ("IRS") Form 8871, is: "To educate the public on political issues of national importance and to conduct other activities consistent with the status of a political organization under 26 USC 527."

It chose to be taxed under section 527, instead of section 501(c), so that it could speak freely without regard to the restrictions that the IRS places on the speech of section 501(c) organizations. *See, e.g.,* Definition of Political Committee, 66 Fed. Reg. 13,681, 13,687 (Mar. 7, 2001) (noting a wide range of activities captured by the IRS definition of "exempt function," and yet not regulated by the Commission). Choosing section 527 status was the most prudent and sensible course for the organization to take under federal tax law, regardless of any considerations related to federal elections.

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Majority Action filed its Notice of Section 527 Status with the IRS on July 13, 2005. Since that time, it has filed regular reports with the IRS, disclosing the identities of all contributors who have given an aggregate of \$200 or more in a calendar year. It has also disclosed the amount, date and purpose of all expenditures made to persons aggregating \$500 or more in a calendar year. Those reports are available to the general public through the IRS's website.

Majority Action was formed to educate the American public regarding Congressional voting records and to promote progressive and Democratic legislative issues. In 2008, Majority Action sponsored an array of communications to contrast Republican policies and positions with the progressive, Democratic positions favored by Majority Action.

Majority Action does not make "contributions" or "expenditures" under the Act. It does not expressly advocate federal candidates' election or defeat. In its written solicitations, it informs donors expressly that their funds will not be used to support the election or defeat of clearly identified federal candidates. It does not coordinate its activities with candidates or political party committees, nor does it make direct contributions to any federal political committees.

## II. ARGUMENT

### A. Majority Action Is Not a 'Political Committee'

The Act defines a "political committee" as, inter alia, a group of persons that receives contributions or makes expenditures aggregating more than \$1,000 in a calendar year. *See* 2 U.S.C. § 431(4)(A). Thus, one must receive "contributions" or make "expenditures" to become a political committee. *See id.*

These terms are linked to express advocacy. As the Supreme Court held in *Buckley v. Valeo*, 424 U.S. 1 (1976), vagueness concerns require the definition of "expenditure" to apply only "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject,'" *Id.* at 44 n.52. The United States Court of Appeals for the Second Circuit applied this same logic to the definition of "contribution," concluding that the Act's disclaimer requirements apply only to "solicitations of contributions that are earmarked for activities or 'communications that *expressly advocate* the election or defeat of a clearly identified candidate.'" *Fed. Election Comm'n v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) (quoting *Buckley*, 424 U.S. at 80) (emphasis added).

Without express advocacy, only coordination can potentially turn a payment into an expenditure. *See* 2 U.S.C. § 441a(a)(7). Here, too, however, the Act and Commission regulations place clear limits on the universe of payments that may be transformed into "contributions" by coordination. *See, e.g., id.* § 441a(a)(7)(C) (treating payments for "electioneering communications" as contributions where coordinated with candidates or parties); *see also* 11 C.F.R. Part 109

(prescribing specific coordination rules for public communications). While the Complaint alleges that Majority Action's election-year spending somehow warrants special scrutiny, the Commission has held just the opposite, setting bright lines within the election year in order to avoid "chill[ing] legitimate lobbying and legislative activity." *Coordinated Communications*, 71 Fed. Reg. 33,190, 33,197 (2006).

The Complaint is an unjustified attempt at just this sort of chill. Political committee status requires either: (1) express advocacy, *see Buckley*, 424 U.S. at 44 n.52; (2) a payment earmarked for express advocacy, *see Survival Educ. Fund*, 65 F.3d at 295; or (3) in limited circumstances, coordination. But the Complaint fails to allege that Majority Action engaged in any of these activities. None of the communications sponsored by Majority Action and described by the Complaint come anywhere close to express advocacy. None refers to voting; all refer only to policy positions and official actions taken by Members of Congress. Furthermore, Majority Action received no payments earmarked for express advocacy and engaged in no coordination with candidates or parties. The Complaint does not even bother to allege that it did. Hence, the Complaint's core allegation of political committee status fails as a matter of law.

#### **B. The Complaint Misstates the Test for Political Committee Status**

As described above, the Complaint does not allege that Majority Action engaged in express advocacy, received payments earmarked for express advocacy, or coordinated with candidates or parties. Instead, it concludes that Majority Action's "major purpose is to influence the election of individuals to Federal office" because it is a 527 organization that criticized Members of Congress. This argument fails at every turn.

*First*, the Complaint misstates the so-called "major purpose" test. It is not the Commission's test for political committee status. Rather, it is a judicial construct that spares some organizations from political committee registration and reporting, even though they have raised or spent more than \$1,000 on express advocacy. *See Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986); *Buckley*, 424 U.S. at 78-79; *Fed. Election Comm'n v. GOPAC, Inc.*, 917 F.Supp. 851, 859 (D.D.C. 1996); Political Committee Status, 69 Fed. Reg. 68,056, 68,065 (Nov. 23, 2004) ("The 'major purpose' test is a judicial construct that limits the reach of the statutory triggers in FECA for political committee status."). Complainants attempt to twist a doctrine that is supposed to *protect* organizations from the burdens of political committee registration, into the principal basis for deciding that they are, in fact, political committees.

*Second*, the Complaint mistakenly equates "political committee" status under the FECA with "political organization" status under the Internal Revenue Code, ignoring the Commission's repeated statements to the contrary. In 2001, the Commission noted that the IRC "definition is on its face substantially broader than the FECA definition of 'political committee.'" Definition of Political Committee, 66 Fed. Reg. at 13,687. It said also that the IRS had found that "activities such as circulating voting records, voter guides and 'issue advocacy' communications – those that

do not expressly advocate the election or defeat of a clearly identified candidate – fall within the 'exempt function' category under I.R.C. Section 527(E)(2)." *Id.*

Similarly, in 2004, the Commission initiated an extensive rulemaking to decide when unregistered 527s must be treated as political committees. It expressly rejected equivalency between political organization status under the IRC and political committee status under the FECA. *See* 69 Fed. Reg. at 68,065. Thus, if a group engages in no express advocacy or coordination, makes no direct or in-kind contributions, and solicits no funds under section 100.57, it is not a political committee.

*Finally*, the Complaint's argument is at odds with Congressional intent. Three times, Congress passed legislation knowing that 527 groups would sponsor communications criticizing federal candidates without becoming political committees. *See* 69 Fed. Reg. at 68,065. It chose to regulate these communications narrowly: first by imposing limited reporting requirements on 527s in 2000, and then by amending those requirements in 2002. It continued this path of narrow regulation in BCRA. It created a special category called "electioneering communications," limited that category by time frame and type of media, and imposed abbreviated limits, source restrictions and reporting requirements. *See* 2 U.S.C. § 441b(c). The law even refers to section 527 organizations specifically. *See id.* § 441b(c)(2). The Commission put it neatly in 2004: imposing political committee status automatically on section 527 organizations would entail "a degree of regulation that Congress did not elect to undertake itself when it increased the reporting obligations of 527 groups in 2000 and 2002 and when it substantially transformed campaign finance laws through BCRA." 69 Fed. Reg. at 68,065.

Thus, the Complaint's basic premise – that an organization becomes a political committee when it criticizes federal candidates, simply because of its tax status – is false. It depends on a misreading of the "major purpose" test that the Commission has rejected. *See* 69 Fed. Reg. at 68,065. It assumes a false equivalency between "political organization" status under the IRC and "political committee" status under the FECA that the Commission has also rejected. *See* 66 Fed. Reg. at 13,687. And it ignores that Congress chose different and more narrowly tailored means to regulate the activities of unregistered 527s. *See* 2 U.S.C. 441b(c)(2). The Complaint provides no legal basis to conclude that Majority Action is a political committee.

### III. CONCLUSION

In sum, the NRCC's Complaint does not allege any facts that, if true, would constitute a violation of FECA. It alleges no express advocacy, no improper solicitation, and no coordination. For the foregoing reasons, the Commission should dismiss the Complaint as to the Respondent, and take no further action.

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Very truly yours,



Brian G. Svoboda